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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/840,042	05/06/2004	Mark Edwin Forry	9630	7766

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EXAMINER

CORDRAY, DENNIS R

ART UNIT	PAPER NUMBER
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1731

DATE MAILED: 09/28/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/840,042

Applicant(s)

FORRY ET AL.

Examiner

Dennis Cordray

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-28 is/are pending in the application.
4a) Of the above claim(s) 21, 22, 27 and 28 is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-20 and 23-26 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|--|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date <u>9/27/04, 1/26/06</u> | 6) <input type="checkbox"/> Other: ____ |

DETAILED ACTION

Election/Restrictions

This application contains claims directed to the following patentably distinct species of the Invention:

I. A method for making a patterned fibrous structure comprising 1) providing a fibrous structure comprising latex and 2) subjecting the structure to a deformation generating process, and the structure or product obtained therefrom (Claims 1-20 and 23-26).

II. A method for making a patterned fibrous structure comprising 1) providing a patterned fibrous structure or sanitary tissue product comprising the patterned fibrous structure and 2) applying latex to the structure or product, and the structure or product obtained therefrom (Claims 1-18, 21-22 and 27-28).

The species I and II are independent or distinct because (A) the processes as claimed do not overlap in scope, (B) the inventions as claimed are not obvious variants, and (C) the inventions as claimed have a materially different design or mode of operation.

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, no claims are generic.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim

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is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which depend from or otherwise require all the limitations of an allowable generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species. MPEP § 809.02(a).

During a telephone conversation with Mr. Brant Cook on 18 Sept. 2006, a provisional election was made with traverse to prosecute the invention of claims 1-20 and 23-26. Affirmation of this election must be made by applicant in replying to this Office action. Claims 21-22 and 27-28 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-9, 11, 13-14 and 16-18 are rejected under 35 U.S.C. 102(b) as being anticipated by Chen et al (5990377).

Claims 1, 5-7 and 17: Chen et al discloses a patterned fibrous structure (Abs) that comprises a latex either as a hydrophobic material or as an adhesive (col 5, lines 39-41; col 34, line 48 to col 35, line 24, especially col 35, lines 3-21; col 37, line 53 to col 8, line 26, especially col 38, lines 5-26). The latex can be an ethylene-vinyl acetate copolymer, an acrylic polymer or a styrene-butadiene copolymer. Specific commercial products recited include Airflex™ and Nacrylic™, which are recited as suitable latexes on p 8 of the instant Disclosure. The latexes have glass transition temperatures (T_g) in the claimed range (see Swoboda et al, 6740373, col 27, Table 5, where a T_g from -7 to 29 °C is listed for several latex formulations of the above described compositions). An absorbent article made using the structure is claimed (col 52, Claim 17).

Claims 2 and 11: Chen et al discloses that the structure comprises two surfaces, either of both of which can be patterned (Figs 1-3; col 26, lines 34-41). The overall surface depth for each patterned surface (deformation height) is from 0.4 to 0.8 mm (400 to 800 μm) (col 14, lines 32-42, especially lines 40-42; col 32, lines 21-32, especially line 32; col 28, lines 4-7).

Claims 3 and 4: Chen et al discloses that the structure can be wet laid or air laid by standard processes (col 28, lines 55-64; col 29, lines 52-63).

Claims 8 and 9: Chen et al discloses that the basesheet has substantially uniform density for good absorption (col 27, lines 38-43). In some embodiments, the structure comprises an underlying fibrous structure that has a pattern of densified regions imparted by embossing or other techniques, thus the structure can have regions of high and low density (col 27, line 54 to col 28, line 3).

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Claims 13 and 14: Chen et al discloses the stretch in both cross direction and machine direction of greater than 10% (col 31, lines 30-39). Figure 16 shows the density and basis weight of sheets made. Dividing the basis weight by the density gives the caliper of the sheets, which varies (with appropriate unit conversion) from 23.5 to 25 mils.

Claims 16 and 18: Figures 1-3 and 5-6 show structures of Chan et al that cannot nest. Since the patterned sheets have void spaces beneath the raised portions, the caliper of the patterned sheets would be greater than unpatterned sheets having no void spaces.

Claims 1-2, 5, 11, 14 and 19 are rejected under 35 U.S.C. 102(b) as being anticipated by Kershaw et al (5409572).

Kershaw et al discloses an embossed tissue of high softness having one or both surfaces embossed (Abs; col 1, lines 65-68). The depth of the embossing can be up to 0.06 inch or over (1524 μ m) (col 2, lines 18-24). The sheets have a caliper from 0.02 to 0.1 inch (20 to 100 mils) (col 8, lines 4-27). Latex can be included in the sheet as a commonly known and used additive in papermaking processes (col 5, lines 12-20).

Claims 19-20 and 25-26 are rejected under 35 U.S.C. 102(b) as being anticipated by Bouchette et al (4612231).

Bouchette et al discloses a method of making a patterned fibrous web comprising forming a web by air-laying fibers onto a forming surface, applying a bonding material to

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the web, curing the bonding material, then imprinting a pattern into the bonded, cured web (col 4, line 38 to col 5, line 6). The bonding material is a latex (col 5, lines 59-66).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 10, 12 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chen et al.

Chen et al does not disclose the HFS absorbency or the wet burst strength of the structure. Chen et al also does not disclose the latex being substantially present in the high density regions of the structure.

Chen et al discloses multiple-ply structures wherein the layers can be joined by adhesives (col 36, line 64 to col 37, line 11). Figures 2-3 show such structures. It would have been obvious to one of ordinary skill in the art to use a latex as an already disclosed as an adhesive (col 5, lines 39-41; col 38, lines 1-6) to join the layers together. Where the lower areas of the basesheet joins either another layer or the lower areas of a second inverted basesheet, an area of higher density is created because there is no air pocket, thus the latex adhesive would be concentrated more in the high density areas.

The structure of Chen et al is substantially identical to the claimed structure. It would have been obvious to one of ordinary skill in the art at the time of the invention to obtain the claimed properties of HFS absorbency and wet burst strength because, where the claimed and prior art apparatus or product are identical or substantially identical in structure or composition, a *prima facie* case of either anticipation or obviousness has been established. *In re Best*, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977). In other words, when the structure recited in the reference is substantially identical to that of the claims, the claimed properties or functions are presumed to be inherent.

Claims 23 and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bouchette et al.

Bouchette et al teaches that fibrous webs are made by two conventional processes, wet laying by depositing fibers onto a forming surface from an aqueous slurry, and air laying by depositing the fibers from an air stream (col 1, lines 33-64).

It would have been obvious to one of ordinary skill in the art to form the web by wet laying as a conventional and functionally equivalent option.

Double Patenting

A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re*

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Ockert, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

Claims 1-20 and 23-26 are provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 1-20 and 23-26 of copending Application No. 11/105998. This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure [Trokhan (4469735), Chen et al (US 2002/0099347), Chen et al (US 2004/0123963), Chen et al (US 2004/0157524)]. They disclose other patterned, latex-containing fibrous structures.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Dennis Cordray whose telephone number is 571-272-8244. The examiner can normally be reached on M - F, 7:30 -4:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Steven Griffin can be reached on 571-272-1189. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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